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Habeas Corpus and the War on Terror

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I. INTRODUCTION

The United States Government decided that Abu Bakker Qassim and A'del Abdu Al-Hakim never were terrorists, but held them as prisoners for four years anyway.[1] These two non-

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1. Qassim v. Bush, 407 F. Supp. 2d 198 (D.D.C. 2005).

combatants were held at the United States Guantanamo Bay, Cuba, naval station from June 2002 until August of 2006.[2] No one could tell them when they would be released.[3] Federal courts claimed that they did not have the power to help them.

The two men were originally captured by Pakistani bounty hunters who were paid five thousand dollars for capturing these "terrorists."[4] Sometime after the detainees arrived in Guantanamo Bay, a Combatant Status Review Tribunal (CSRT) was held.[5] The CSRT summarily found that they were not enemy combatants.[6] One would expect that, at a minimum, the United States Government would have apologized to the men and sent them home. That is not what happened.

The Government never told these men that they had been found to be non-combatants, and their status was not known outside of Cuba until their attorneys were eventually allowed to meet with them in July 2005.[7] Naturally, the prisoners' attorneys motioned for their immediate release, filing Writs of Habeas Corpus.[8] The Government argued that it should be allowed to retain custody of the men because of "the Executive's necessary power to wind up wartime detentions in an orderly fashion."[9] A federal judge, after finding that the men should indeed go free, nevertheless allowed the Government to continue holding the men because he did not believe he could craft an effective remedy.[10] The judge gave the Government seven days to decide how to fix the problem.

Days later, Senator Lindsay Graham offered an amendment to the Detainee Treatment Act (DTA) which would revoke Abu Bakker Qassim's and A'del Abdu Al-Hakim's right to file a Habeas petition or "any other action against the United States or its agents relating to any aspect of . . . [their] detention . . . ."[11] The DTA, including the Graham Amendment to the original bill, passed easily. The DTA has since been amended, in the wake of

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2. *Qassim*, 407 F. Supp. 2d 198.
3. *Id.*
4. P. Sabin Willett, *Detainees Deserve Court Trials*, WASH. POST, Nov. 14, 2005, at A21, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/13/AR2005111301061.html.
5. *Qassim*, 407 F. Supp. 2d at 199.
6. *Id.*
7. *Id.*
8. Willett, *supra* note 4, at A21.
9. *Qassim*, 407 F. Supp. 2d at 199.
10. *Id.* at 203.
11. 151 CONG. REC. S12652-01 (daily ed. Nov. 10, 2005) (Amendment of Sen. Graham to S.1042).

the Supreme Court's *Hamdan v. Rumsfeld* opinion in 2006.[12] The detainees discussed above were eventually released by the President after four years of pressure from the international community. Senator Graham's jurisdiction-stripping provision remains in force after the 2006 amendments, and hundreds of prisoners are still held at Guantanamo Bay, regardless of their CSRT status.[13]

The "Great Writ" of Habeas Corpus is one of the common law's most venerable traditions, allowing a prisoner to require his jailer to show why he is being held.[14] It is one of the only rights referred to in the body of the Constitution rather than in the Bill of Rights.[15] The "Suspension Clause" of the Constitution specifically limits when the right to file a Writ of Habeas Corpus may be revoked.[16]

The Writ's purpose has always been to force the Executive to "show cause" when he detains an individual.[17] Normally, this is not an issue in wartime because the cause can be succinctly articulated — a combatant would return to fight for the enemy if set free.[18] Because the issue is normally so clear, the common law exempted from review the Executive's decisions in this particular realm.[19] Ostensibly, when a war ends, the prisoners would be either returned to their country of origin, or in more recent epochs, tried as war criminals by the world community.

The paradigm has shifted. Wars are no longer fought between sovereign nations. Who is and who is not a combatant in a conflict has become a matter of subjective judgment based on incomplete information. The Great Writ must be allowed to shift as well if its purpose is to be maintained.

The Supreme Court's June 2004 decision in *Rasul v. Bush* afforded non-citizen detainees held at the Guantanamo Bay Naval Base the right to file Writs of Habeas Corpus in federal court.[20] The DTA then stripped the courts of their power to hear Habeas petitions in cases coming from Guantanamo Bay in almost all

12. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

13. Josh White, *U.S. Sends Home 33 Detainees From Guantanamo Bay*, WASH. POST, Dec. 18, 2006, at A19.

14. WILLIAM BLACKSTONE, 1 COMMENTARIES *133 (describing the Habeas Corpus Act of 1679 as a second Magna Carta).

15. U.S. CONST. art. I, § 9, cl. 2.

16. *Id.*

17. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 42 (1980).

18. *See infra* notes 70-72 and accompanying text.

19. *See infra* notes 58-59 and accompanying text.

20. Rasul v. Bush, 542 U.S. 466, 473 (2004).

meaningful circumstances.[21] The express purpose of the DTA's jurisdiction-stripping provisions was to prevent detainees from challenging the legality and conditions of their detention.[22]

This article focuses on the DTA's jurisdiction-stripping provisions and their net effects on the ability of Guatanamo detainees to avail themselves of the federal courts, both through Habeas Corpus and other common law constitutional challenges.[23] Specifically, it addresses the following issues: whether the Legislative Branch has the power to remove or limit jurisdiction of a right based in the Constitution in these circumstances; whether the provision allowing for an appeal to the D.C. Circuit satisfies the constitutional right, if one exists; whether a constitutional right to Habeas Corpus extends to non-citizens; and whether other avenues might be available for detainees to challenge their detention. Part II examines the long history of the Great Writ. Part III analyzes the extent to which the DTA currently limits Habeas Corpus in Guantanamo Bay and the possible constitutional and precedential challenges the current law might face in federal court. Part IV recommends that the Supreme Court recognize a constitutional right to Habeas Corpus. It also recommends changes to the language of the DTA's jurisdiction-stripping provisions that would make it more likely to survive judicial scrutiny while still effectuating the goals of the legislation and giving deference to the Executive in wartime. Finally, Part V concludes that the current iteration of the DTA is unconstitutional because it cuts off the right to Habeas Corpus for an individual deemed to be a non-combatant who is nevertheless still detained by the Executive Branch.

II. BACKGROUND

In order to articulate a cogent argument about jurisdictional limitations to Habeas Corpus, one must first look at the long history of the Writ, from its inception, and the intent of the Framers when they included it in the Constitution. One must also have an understanding of the various circumstances in which Congress

21. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742-44.

22. *See* 151 CONG. REC. S12752-53 (daily ed. Nov. 14, 2005) (statement of Sen. Graham).

23. This article declines to analyze the jurisdictional quandary presented by detainee cases currently pending in the federal courts. Instead, it focuses on the right of detainees to bring new actions under the amended statutory scheme.

has limited the right. Further, it is important to understand the current statutory framework under the DTA, including Department of Defense guidelines with respect to combatant determination hearings.

A. The Current Framework

In order to comply with the Supreme Court's decision in *Rasul*, the Department of Defense almost immediately began conducting hearings to determine whether or not detainees were combatants.[24] The *Rasul* Court required that some sort of process be afforded the detainees in the combatant determination; however, the form of process was to be determined by the Executive.[25] By conducting hearings and formally calling a prisoner an enemy combatant through a military commission, the Executive believed the laws of war, rather than the Constitution, would apply. While this approach provides some process, it is woefully inadequate in most circumstances.

The rules for combatant determination hearings were promulgated by the Secretary of the Navy just weeks after the *Rasul* decision.[26] The rules provide for a three-judge panel comprised of military officers, with at least one Navy captain and one member of the Judge Advocate General (JAG) Corps.[27] Each member of the panel has an equal vote, and a simple majority is required for a determination that a detainee is a combatant.[28] Evidence is presented to the panel by a military officer, preferably a member of the JAG Corps who is at a minimum a lieutenant in the Navy.[29]

The rules afford the detainee a "personal representative" who is also a member of the armed forces, is at least the rank of Navy lieutenant-commander, and is specifically not a JAG officer.[30] The personal representative is charged with informing the detainee that he is neither a lawyer, nor the detainee's advocate.[31] Infor-

24. Toni Locy, *Tribunal Orders Release of Guantanamo Detainee*, USA TODAY, Sept. 8, 2004, http://www.usatoday.com/news/washington/2004-09-08-gitmo-release_x.htm.

25. *Id.*

26. Memorandum for Distribution from Gordon England, Secretary of the Navy, on Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Naval Base, Cuba (Jul. 29, 2004) (on file with the author)[hereinafter England Memo].

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. England Memo, *supra* note 26.

mation imparted by the detainee to the personal representative will not be held in confidence and can be used against him.[32]

The detainee may choose to waive participation in the hearings, but the hearings will continue without his participation.[33] The detainee may not see any evidence that is declared classified, but his personal representative may gain access to the information.[34] The detainee may call witnesses on his behalf if they are reasonably available.[35] Military witnesses are not reasonably available if their military commanders deem them required for combat operations.[36] Civilian witnesses are not reasonably available if they cannot be contacted, or if security clearance issues make their presence a security risk. Non-government personnel are required to appear at the hearings at their own expense.[37]

The Government must prove by a preponderance of the evidence that the detainee is an enemy combatant.[38] All government evidence is accepted with the rebuttable presumption that it is genuine and accurate.[39] Once the panel reaches a decision, it is reviewed by the legal advisor to the Director of Combatant Status Review Tribunals for legal sufficiency.[40] The Director of CSRTs then makes a final determination as to the detainee's status based on the recommendation of the panel or refers the case back to the panel for further deliberation or fact-finding.[41]

Under the DTA, the findings of the CSRT are then reviewed by the United States Court of Appeals for the District of Columbia.[42] The DTA strips federal district courts of jurisdiction over Writs of Habeas Corpus filed by detainees.[43] The amended statue only allows the D.C. Circuit Court to review whether the CSRT complied with the standards and procedures set forth by the Department of Defense.[44] The only individuals who may appeal their cases are those who have already been before the CSRT and who wish to

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32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. England Memo, *supra* note 26.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. England Memo, *supra* note 26.
42. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742-44.
43. *Id.*
44. *Id.*

challenge the way in which the tribunal carried out its duties.[45] The statute does not indicate whether the Circuit Court's determination is appealable to the United States Supreme Court.

Detainees are not permitted to challenge the conditions of their detention or the finding of the CSRT if all of the prescribed procedures are followed. Furthermore, they are not allowed to challenge their detention after they have been found to be "No Longer Enemy Combatants" (NLECs), allowing the Executive to hold non-combatants at Guantanamo indefinitely without legal recourse.

B. The Origins of Habeas Corpus

The Great Writ of *Habeas Corpus ad sibjiciendum* originated in the courts of England as part of the country's efforts to shrug off the dictatorial vestiges of the monarchy.[46] Habeas Corpus was originally instituted as part of a larger effort to bring about an end to private revenge killings in eighth century England.[47] The rule's initial purpose was to ensure that individuals were brought before courts of law before any vengeance was taken.[48] Sir Edward Coke articulated the principle succinctly when he stated, "it manifestly appeareth, that no man ought to be imprisoned but for some certain cause: and these words '*Ad subjiciend Et recipiend*,' prove that cause must be shewed: for otherwise how can the Court take order therein according to Law."[49]

The Asize of Clarendon was written under Henry II.[50] It contained one of the first references to showing "the body" of a prisoner to a court.[51] Up to this point, the Writ was used largely as a jurisdictional tool.[52] Its purpose was to force widely dispersed and fiercly independent local courts to subjugate their judgments concerning a prisoner to those of the Crown's courts.[53]

The Writ continued to evolve throughout the years, and by the sixteenth century, the first (unsuccessful) interaction between the

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45. *Id.*

46. HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1284 (5th ed. 2003) (citing William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978)).

47. DUKER, *supra* note 17, at 14.

48. *Id.*

49. EDWARD COKE, THE SECOND PART OF THE INSTITUTE OF THE LAWS OF ENGLAND ch. XXIX (5th ed. 1671).

50. *Id.*

51. 2 ENGLISH HISTORICAL DOCUMENTS 407-10 (David Douglas & George Greenway eds., 1953).

52. DUKER, *supra* note 17, at 39.

53. *Id.*

Admiralty and the courts over Habeas was documented in *Dolphyn v. Shutford.*[54] Eventually, in *Thomilson's Case*[55] and *Hawkridge's Case,*[56] the Writ was put successfully to the Admiralty, forcing it to deliver prisoners to the common law courts.[57] By forcing the Admiralty to obey the Writ, the courts were able to show their primacy over the actions of an agent of the Monarchy.

For a time in English history, a return of a Writ stating that a prisoner was being held by the military "by special command of his majesty" was considered enough to hold an individual indefinitely.[58] No reason beyond that cursory explanation was deemed necessary.[59] That changed in 1587 when the common law courts again engaged in a showdown with the military in *Hellyard's Case.*[60] In an important step forward for the Great Writ, an English court freed a prisoner held by the army when a Writ issued by the courts was returned stating only that the prisoner was committed "by order of Frances Walsingham, principal military secretary of her majesty's household."[61] In this way, the courts, through the Writ, were able to assert their dominance over the monarch's military agents and force them to either free or turn over prisoners.

By 1620, Parliament had formed and passed resolutions supporting the ideal that no subject of the Crown should be imprisoned unless the Crown first showed cause.[62] *Chamber's Case*[63] was decided the same year.[64] It was the first instance where a court specifically used Habeas Corpus to free a prisoner who had been unlawfully jailed by the Monarch's Privy Council, rather than using it as a means of protecting jurisdiction.[65] This change showed the evolution of the Writ. Rather than simply enabling a court to force the Executive to appear and articulate a reason for

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54. *Id.*
55. 77 Eng. Rep. 1379 (C.P. 1605).
56. 77 Eng. Rep. 1404 (C.P. 1617).
57. DUKER, *supra* note 17, at 39.
58. *Id.* at 43 (quoting Darnel's Case, 3 How. St. Tr. 1, 3 (1627)). In *Darnel's Case*, the barristers for the prisoners argued that the Writ should prevent arbitrary imprisonments of indeterminate length by the King. They were not successful, as the courts were held to be merely an arm of the King and were therefore required to do his will. *Darnel's Case*, 3 How. St. Tr. at 6-7.
59. DUKER, *supra* note 17, at 43.
60. *Id.* at 41 (citing Hellyard's Case, 74 Eng. Rep. 455 (C.P. 1587)).
61. *Id.*
62. *Id.* at 44-45.
63. 79 Eng. Rep. 717 (K.B. 1629).
64. DUKER, *supra* note 17, at 46.
65. *Id.*

the detention, the Writ of Habeas Corpus was now a vehicle to free someone held by the Executive, regardless of what the detaining agent asserted. By this time in English history, the Writ was firmly entrenched as a means for the court to assert its dominance in matters of detention.

The Habeas Corpus Act was passed by Parliament in 1641, abolishing the Court of the Star Chamber.[66] This court, which was able to hear sedition cases in secret at the behest of the King with no right to appeal, was seen as the Crown's last trump card in preventing courts from using their power under the Great Writ.[67] In abolishing the Star Chamber through the Habeas Corpus Act, Parliament firmly established that the Writ could be asserted against any detention ordered by the King.

A second Habeas Corpus act was enacted in 1679. It was called the "second Magna Carta" by Blackstone.[68] It contained largely the same text as the previous acts and specifically stated that individuals imprisoned for non-felonious reasons should be released upon the filing of a Writ and the provision of appropriate securities.[69] The fully matured Writ now clearly stated that no person should be held by the Crown without good cause.

1. Early Habeas Corpus in Wartime

From its earliest application, the Writ of Habeas Corpus was not available for enemy soldiers because the underlying reasons for their detention were determined to be different from those purportedly proscribed by Habeas Corpus.[70] During wartime, the most important reason for detention is preventing a combatant from returning to the battlefield to inflict more damage.[71] The

66. *Id.* at 47.

67. *Id.*

68. BLACKSTONE, *supra* note 14, at *133.

69. Habeas Corpus Act of 1679, *available at* http://www.Constitution.org/eng/habcorpa.htm.

70. Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) (citing Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 572 (2002) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war'") (quoting Decision of Nuremberg Military Tribunal, *reprinted in* 41 AM. J. INT'L L. 172, 229 (1947); W. WINTHROP, MILITARY LAW AND PRECEDENTS 788 (rev. 2d ed. 1920) ("The time has long passed when 'no quarter' was the rule on the battlefield . . . . It is now recognized that 'Captivity is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.' . . . 'A prisoner of war is no convict; his imprisonment is a simple war measure.'") (citations omitted); *cf. In re* Territo, 156 F.2d 142, 145 (9th Cir. 1946))).

71. *Hamdi*, 542 U.S. at 518.

detention is viewed as lawful while war is waged.[72] The Writ, however, did apply in those lands under the control of the English army after the war ended.[73] Further, English courts "confirmed that the reach of the Writ depended not on formal notions of territorial sovereignty, but rather on the practical question of the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown."[74] The Writ applied in any place where England asserted dominance, regardless of whether puppet governments staffed by natives of the subjugated land were allowed to rule nominally.

In 1775, Lord Mansfield held that a Minorcan native could sustain a Writ against the military governor of Minorca.[75] English courts held that prisoners captured on French ships during wars with France should receive the right to Habeas Corpus once they are determined to be neutrals.[76] The Writ also applied to slaves found on American ships docked in England, but bound for Jamaica.[77] These examples illuminate the basic proposition that, historically, neither citizenship nor physical presence in England were necessary for the assertion of the right to Habeas Corpus.

C. History of Habeas Corpus in the Colonies

At the time of the first colonial charter in Virginia, Habeas Corpus was already well established in England and in the territories controlled by the Crown. The laws of England were generally held to be part of the common law and therefore applicable in the colo-

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72. *Id.*

73. *See* King v. Cowle, 97 Eng. Rep. 587, 598-99 (K.B.).

74. Rasul v. Bush, 542 U.S. 466, 482 (2004) (citing *Ex parte* Mwenya, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)); *see also* Brief Amici Curiae of Legal Historians Listed Herein in Support of the Petitioners at 7 n.15, Rasul v. Bush, Nos. 03-334, 03-343 (D.C. Cir. Jan. 14, 2004) (citing Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 LAW & HIST. REV. 439, 461 (2003)); *see also* BLACKSTONE, *supra* note 14, at *107 ("In conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.") (citing Calvin v. Smith, 77 Eng. Rep. 377 (K.B. 1608)); M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 117 (1755) (discussing the extension of common English law to Ireland); J. SMITH & T. BARNES, THE ENGLISH LEGAL SYSTEM: CARRYOVER TO THE COLONIES 6-7 (1975) ("Under the concepts of *Calvin's Case*, if the King put into effect the laws of England for the government of a conquered Christian kingdom, no succeeding king could alter them without an act of Parliament.").

75. Fabrigas v. Mostyn, 20 How. St. Tr. 81 (K.B. 1775).

76. King v. Schiever, 97 Eng. Rep. 551 (K.B. 1759).

77. Sommersett v. Stewart, 20 How. St. Tr. 1, 79-82 (K.B. 1772).

nies.[78] In 1720, the counsel to the English Board of Trade made this clear when he stated "[l]et an Englishmen go where he will, he carries as much of law and liberty with him, as the nature of things will bear."[79]

The Writ was, at least at the outset, unevenly applied throughout the colonies. There were several attempts in Massachusetts to formally adopt the Habeas Corpus Act of 1679, but each was denied by the Privy Council as well as Parliament.[80] In New York, the Carolinas, and Virginia, the Act was applied regularly, either de facto or de jure, from very early on.[81] Even where a law had not been specifically passed recognizing the right, the colonies accepted a legitimate court's ability to hear a Habeas petition.

In Maryland, the appointed governor argued that the statutory acts which supported Habeas Corpus had not carried over from England, and therefore, the Writ was not available to members of the colony.[82] Daniel Dulany, writing under the pseudonym Cato, argued that Englishmen in the colonies were "entitled to the same Right, and Liberties, with the rest of the Subjects, of the same Prince, of their Degree, and Condition."[83] Dulany's position eventually carried the day.[84] In most of the colonies, citizens were very aware of English liberties and availed themselves of them in the courts of the colonies without significant hardship.[85] By 1776, the common law Writ was available in all thirteen colonies, with or without a statutory grant from either the local government or the Crown.[86]

D. The Drafting of Article I, Section 9, Clause 2 and the Intent of the Framers

The Framers of the Constitution reached a broad consensus at the Philadelphia Convention that Habeas Corpus should be protected.[87] It has generally been accepted that Article I, Section 9, Clause 2 was inserted into the Constitution to guarantee the right

78. *Sommersett*, 20 How. St. Tr. at 97.
79. DUKER, *supra* note 17, at 98.
80. *Id.* at 101-02.
81. *Id.* at 104-06.
82. *Id.* at 107.
83. *Id.*
84. DUKER, *supra* note 17, at 115.
85. *Id.* at 111.
86. *Id.* at 115.
87. F. Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 608 (1970).

to Habeas Corpus.[88] At the Convention, Charles Pinkney of South Carolina moved that "[t]he privileges and benefit of the Writ of Habeas Corpus shall be enjoyed in this government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding months."[89] While the Suspension Clause does not include a specific temporal limitation, it is apparent from the history of its drafting that permanent suspension of the Writ would have been considered unconstitutional by its drafters, given the specific, enumerated instances in which it could be suspended.

Some of the Framers felt that the right to Habeas Corpus should not be suspended under any circumstances.[90] Others were of the opinion that it should only be suspended "in cases [when] Rebellion or invasion . . . may require it."[91] Eventually, the latter was approved in substance by the Convention.[92] The Suspension Clause continued to be discussed after the Convention throughout the ratification phase.[93] While issues of state's rights with regard to the clause were debated, individuals on all sides of the great debate over the Constitution and the Bill of Rights concurred that a robust Habeas Corpus provision was an important check on the power of the Executive.[94] The real debate was not over the existence of the right, but rather over articulating specific limitations on suspension. The concern, just as in the Bill or Rights, was that a specific textual inclusion might inadvertently limit the right.[95]

The anti-Federalists expressed a great deal of concern that granting the federal government the power to suspend the Writ would support tyranny.[96] The Federalists assured the anti-Federalists that this was in fact not the case; the clause was there

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88. *See generally id.*; Eric M. Freedman, *Milestones in Habeas Corpus: Part I: Just Because John Marshall Said It, Doesn't Make It So: Ex parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531 (2000).

89. Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451, 455 (1996) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 340-41 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND]).

90. *Id.* at 456.

91. *Id.*

92. *Id.* at 457. *See* U.S. CONST. art. I, § 9, cl. 2, providing "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.*

93. FARRAND, *supra* note 89, at 438.

94. *Id.*

95. *Id.*

96. *Id.* at 458.

to be used only in the gravest emergency and would not be used to suspend the Writ indefinitely.[97] In fact, four states specifically asked for a clause in the new Constitution guaranteeing the right to file a Writ of Habeas Corpus without any means of suspension.[98] On the whole, it seems that the Framers' intent, and the intent of the several states in agreeing to the provision through ratification, revolved around preventing a return of Star Chamber-like practices by the Executive.

E. Supreme Court Jurisprudence

The Supreme Court has held that Habeas Corpus developed into a significantly more expansive doctrine than the initial right imported from England.[99] Hart and Wechsler succinctly identify several instances of Habeas Corpus that do not involve post-conviction remediation:[100] the legality of detention in immigration proceedings,[101] trials before military commissions,[102] pre-trial detention,[103] extradition to a foreign nation,[104] lack of a prompt hearing after an arrest,[105] lack of a prompt trial,[106] and disputes concerning the conditions of confinement.[107] The unifying issue in these cases is the wrongful incarceration of an individual without adequate process provided by the Executive Branch.

While the Great Writ is most often viewed as remedying constitutional violations in criminal convictions, this is certainly not its sole or even primary purpose. Just as in seventeenth century England, the primary purpose of Habeas Corpus throughout our jurisprudence has been to rein in the power of the Executive. Important comparisons can be drawn between the Guantanamo Bay detentions and other cases of executive detention, specifically detention based on alien deportation proceedings.

The concerns of some states regarding an affirmative guarantee of the Writ came into focus in *Ex Parte Bollman*.[108] In that case,

97. *Id.*
98. Paschal, *supra* note 87, at 605.
99. Swain v. Pressley, 430 U.S. 372, 380 n.13 (1977) (stating that Habeas Corpus has expanded "beyond the limits that obtained during the 17th and 18th centuries.").
100. HART, *supra* note 46, at 1285.
101. I.N.S. v. St. Cyr, 533 U.S. 289 (2001).
102. *Ex parte* Quirin, 317 U.S. 1 (1942).
103. *Ex parte* Bollman, 8 U.S. 75 (1807).
104. Fernandez v. Phillips, 268 U.S. 311 (1925).
105. Gerstein v. Pugh, 420 U.S. 103 (1975).
106. Braden v. 30th Judicial Cir. Ct. of Ky., 410 U.S. 484 (1973).
107. Johnson v. Avery, 393 U.S. 483 (1969).
108. 8 U.S. 75 (1805).

where Congress attempted to prevent the federal courts from hearing a Habeas Corpus case, Justice Marshall opined that the Legislative Branch might be under some sort of obligation to ensure efficient jurisdiction over the Great Writ, "for if the means be not in existence, the privilege itself would be lost . . . ."[109] With these words, Marshall acknowledged that the Suspension Clause does not merely state the terms under which Congress can suspend Habeas Corpus; by implication, it also guarantees the right.

In *I.N.S. v. St. Cyr*[110] the power of Congress and the Executive to limit Habeas Corpus via statute was analyzed in the context of a law preventing Habeas review of an alien deportation proceeding. The Executive argued that a statute passed by Congress and signed by the President removed the power of federal courts to hear Habeas Petitions from individuals detained by the Immigration and Naturalization Service.[111] The Supreme Court stated that there would be grave constitutional issues if it adopted the Government's position because it would completely prevent aliens detained by the I.N.S. from availing themselves of the Writ in any circumstance.[112] The majority addressed Marshall's *Bollman*[113] opinion and held that *Bollman* did not stand for the proposition that a jurisdictional statute was required in order to exercise the Suspension Clause right. Rather, the "Clause was intended to preclude any possibility that 'the privilege itself would be lost' by either inaction or the action of Congress."[114] The Court read the Constitution as requiring Congress to confer the right to Habeas on non-citizen detainees held within the country.[115]

While *St. Cyr* affirmed the right of detainees held within the country, it did not address the rights of combatants. In *Johnson v. Eisentrager*,[116] the Supreme Court held that German soldiers captured in China and held for war crimes in Germany could not avail themselves of Habeas Corpus.[117] The Supreme Court overturned the D.C. Circuit, which had decided the case based on a constitutional right to the Writ.[118] The circuit court had held that

109. *Ex Parte Bollman*, 8 U.S. at 95 (1805).
110. 533 U.S. 289 (2001).
111. *St. Cyr*, 533 U.S. 289.
112. *Id.*
113. *Id.* at 304.
114. *Id.*
115. *Id.*
116. 339 U.S. 763, 791 (1950).
117. *Eisentrager*, 339 U.S. at 791.
118. *Id.*

the right to the Writ exists independent of a jurisdictional statute.[119] The appeals court based this decision on three premises. First, it reasoned that the Writ is a common law right, which does not require a statutory vehicle.[120] Second, it noted that the Writ can only be suspended in cases of rebellion or invasion.[121] Third, the circuit court judged that construing the jurisdictional statute to prohibit the Writ would render the statute unconstitutional, which the court should avoid if possible.[122]

The D.C. Circuit Court analyzed the history of the Writ through its English heritage and concluded that case law in England and in the United States supported the conclusion that enemy aliens could resort to Habeas Corpus.[123] Furthermore, it found that the jurisdictional validity of a military tribunal could be tested by using a Writ of Habeas Corpus.[124] The circuit court held that the Constitution does not distinguish between citizens and non-citizens, nor does it differentiate between detentions inside the United States and those in foreign lands over which the government maintains control.[125]

In order to distinguish cases where the British Government had trammeled the rights of non-citizens abroad, the court of appeals argued that the premise of limited government grounded in the Constitution makes the power of the Executive fundamentally different from that of the British monarch.[126] England was a monarchy, in which virtually unlimited power was vested in parliament and the King at the time of the cases cited.[127] The United States, on the other hand, was a democracy, which valued a system in which no branch of government could run roughshod over rights outlined in the Constitution.[128] In the judgment of the circuit court, this fundamental difference in governance required an ex-

119. Eisentrager v. Forrestal, 174 F.2d 961, 963-64 (D.C. Cir. 1949).

120. *Eisentrager*, 174 F.2d at 965.

121. *Id.* at 966.

122. *Id.* at 964 (citing Carus Wilson's Case, 115 Eng. Rep. 759 (1845); *Ex parte* Anderson, 121 Eng. Rep. 525 (1861); Rex v. Crewe, 102 Law Times Rep. 760 (Ct. of App. 1910)).

123. *Id.* (citing *Ex parte* Quirin, 317 U.S. 1 (1942); *In re* Yamashita, 327 U.S. 1, 66 (1946); *Ex parte* Milligan, 71 U.S. 2 (1866); Duncan v. Kahanamoku, 327 U.S. 304 (1946)).

124. *Eisentrager*, 174 F.2d at 965.

125. *Id.*

126. *Id.*

127. *Id.*

128. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 613-14 (1952); Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly ensures a role for all three branches when individual liberties are at stake.").

pansion, rather than a contraction, of Habeas in order to effectuate its ideals.

The appellate court addressed the jurisdictional issue further by reasoning that the detained individual could sue wherever those with "directive power" over the individual — that is, those responsible for the alleged unlawful detainment — were located.[129] The issue was not whether the court could exercise power in a foreign land, but whether it could exercise jurisdiction over members of the Executive Branch.[130] The D.C. Circuit held that it could.[131] This logic would allow any suit against a military detention to be brought in Washington D.C., because those with directive power over such detentions are located there.

Almost fifty years after the Supreme Court overturned the D.C. Circuit Court decision in *Eisentrager*, it revisited the issue in *Rasul* when it held that two Australian and twelve Kuwaiti detainees held at the U.S. Naval Base in Guantanamo Bay, Cuba, without any sort of hearing could avail themselves of the Writ through the federal statute granting Habeas jurisdiction to the lower courts.[132] The Circuit Court of the District of Columbia, relying on the Supreme Court's decision in *Eisentrager*, held that the detainees could not file Writs of Habeas Corpus.[133] The Supreme Court reversed, significantly limiting its own *Eisentrager* holding in favor of the D.C. Circuit's *Eisentrager* opinion.[134]

The Supreme Court held that Habeas is "a Writ antecedent to statute . . . throwing its root deep into the genius of our common law."[135] Further, the Court held that, "[a]s it has evolved over the past two centuries, the Habeas statute clearly has expanded Habeas Corpus beyond the limits that it obtained during the 17th and 18th centuries."[136] The Court analyzed the history of the Writ in American jurisprudence and concluded that its foremost purpose was to prevent the Executive from trammeling individual rights.[137] In reaching these first principles upon which the right

129. *Eisentrager*, 174 F.2d at 967.
130. *Id.*
131. *Id.*
132. Rasul v. Bush, 542 U.S. 466, 472-73 (2004); *see* 28 U.S.C. § 2241 (2006).
133. *Rasul*, 542 U.S. at 472.
134. *Id.* at 473.
135. *Id.* (citing Williams v. Kaiser, 323 U.S. 471, 484 n.2 (1945)).
136. *Id.* at 474 (citing Swain v. Pressley, 430 U.S. 372, 380 n.13 (1977)).
137. *Id.* "Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the Writ of Habeas Corpus largely to preserve these immunities from

was based, the court alluded to the D.C. Court of Appeal's holding and to the six-part test used by that court in its *Eisentrager* opinion.[138]

The Court distinguished its own holding in *Eisentrager* by pointing to the six factors articulated in that case.[139] Those factors were: alienage, place of capture, place of residence, whether the detainees were afforded a military tribunal, what crimes they were convicted of by the tribunal, and whether they were at all times imprisoned outside of the United States.[140] The Court interpreted those six factors as going to the constitutional, not the statutory, right to Habeas Corpus.[141] The *Eisentrager* Court had concluded that no constitutional right to Habeas existed, given the factors in that specific case.[142] In reviewing those same factors in *Rasul*, the Court came to a different conclusion.[143] The *Rasul* Court held that a prisoner who is an alien, was captured outside the country, was not afforded a tribunal or convicted of a war crime, and was imprisoned in Guantanamo Bay, had the right to Habeas Corpus under the pre-DTA version of the Habeas jurisdictional statute.[144]

According to Stevens's majority opinion, when *Eisentrager* was decided there had been a jurisdictional gap in the statutory framework created by the Court's opinion in *Ahrens v. Clark*.[145] The "*Ahrens* gap" existed because individuals who had a constitutional right to Habeas Corpus were not able to avail themselves of that right under the statutory grant. Because of that gap between the constitutional right and the jurisdictional statute, the appellate court necessarily revisited the first principles upon which the right was based for guidance.[146] In explaining *Eisentrager*, the *Rasul* Court discussed that gap.[147] The Court then declared that the gap had been remedied by *Braden v. 30th Judicial Circuit of Kentucky*.[148] Because there was no longer a gap between Con-

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Executive restraint." Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 218-19 (1953) (Black, J., dissenting).

138. *Rasul*, 542 U.S. at 475-76.
139. *Id.*
140. *Id.*
141. *Id.* at 476.
142. Johnson v. Eisentrager, 339 U.S. 763 (1950).
143. *Rasul*, 542 U.S. at 466.
144. *Id.* at 476.
145. *Id.* (citing Ahrens v. Clark, 335 U.S. 188 (1948)).
146. *Id.* at 476-77.
147. *Id.* at 478.
148. *Rasul*, 542 U.S. at 478-79 (citing Braden v. 30th Judicial Cir. Ct. of Ky., 410 U.S. 484, 495 (1973)).

gress' jurisdictional grant to the courts and the constitutional right, the Court did not have to resort to the "fundamental" question of the constitutional right. It did not, however, criticize the lower court for doing so in *Eisentrager*.[149]

Lastly, the Court held that U.S. law unequivocally applies in Guantanamo Bay.[150] The Court found the express terms of the agreement between the United States and Cuba to give U.S. law "complete jurisdiction and control" over the base.[151] As a dénouement, the Court pointed out that "[a]pplication of the Habeas statute to persons detained at the base is consistent with the historical reach of the Writ of Habeas Corpus."[152] The Court cited to English common law history wherein the "Writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'"[153]

In *Hamdan v. Rumsfeld*, the Court declined to decide the Suspension Clause issue in an anticlimactic footnote.[154] Although the case reached the Supreme Court after the DTA had purported to strip jurisdiction over Habeas cases, it was initially filed before the DTA took effect, and the Court held that the DTA did not apply in that particular case.[155]

III. ANALYSIS

The survival of the DTA's jurisdiction-stripping provisions depends on how the Supreme Court will interpret the Suspension Clause and its previous jurisprudence in *Eisentrager*, *St. Cyr*, and *Rasul*. By looking at the impact the statute will have in practice, one can predict that there will be consequences, perhaps unintended by the drafters of the DTA, that directly contravene values echoed in all three cases. While the Constitution does provide for the removal of the right to Habeas Corpus by Congress, it does so only in limited circumstances.[156] The Court will be hard pressed to find that the current statute satisfies the requirements for sus-

149. *Id.*
150. *Id.* at 480.
151. *Id.*
152. *Id.* at 481-82 (citing King v. Cowle, 97 Eng. Rep. 587, 598-99 (K.B.); *Ex parte* Mwenya, (1960) 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)).
153. *Rasul*, 542 U.S. at 482 (citing *Cowle*, 97 Eng. Rep. at 598-99; *Ex parte Mwenya*, 1 Q.B. at 303)).
154. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2764 n.15 (2006).
155. *Hamdan*, 126 S. Ct. at 2764-66.
156. U.S. CONST. art. I, § 9, cl. 2.

pension. Because the DTA will likely not pass muster under the Suspension Clause, the Court will be forced to address the underlying historical and constitutional arguments first brought up by the appeals court in *Eisentrager*, later echoed in *St. Cyr*, and artfully avoided in *Rasul*. If the Court finds that there is, in fact, a right based in the Constitution absent a jurisdictional grant, it will still have to answer more nuanced questions regarding where and in what form such a petition might be brought, and whether a right based on the Constitution, and not a statute, applies to non-citizens. Lastly, assuming such a right does exist and can be exercised by aliens, the Court must still fully address when the right attaches. In doing so, the Court will need to weigh the Executive's need for flexibility, given the nature of modern warfare, against the deleterious effects on the balance of powers that naturally result when one branch's power is unchecked.

A. Implications of the Detainee Treatment Act

As the DTA is written, there is still the possibility for a non-combatant detainee to be held permanently without any way to challenge his detention, thus contravening one of the basic premises of the *Rasul* decision. The statute does allow a detainee to challenge the finding that he is a combatant on procedural grounds.[157] However, it does not allow him to challenge the detention itself after his non-combatant status has been determined by the tribunal, and it removes the right to appeal the nature of the detention.[158] Thus, theoretically, a detainee can be held under inhumane conditions for an interminable amount of time without any recourse after being declared a non-combatant.[159]

Given these two new rules, it is possible for a Guantanamo Bay detainee to be declared an enemy combatant, to appeal that finding to the D.C. Circuit Court, to have the D.C. Circuit remand the case for another CSRT hearing, to be found a non-combatant, and yet to remain a detainee. The detainee's right to challenge his detention has been foreclosed. The only action he can legally challenge is the non-combatant determination, which would accomplish nothing. Effectively, the Executive Branch can keep an individual at Guantanamo indefinitely simply because it feels that

157. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742-44.
158. *Id.*
159. *Id.*

eventually it might find them useful, or because it finds it embarrassing to admit that it held an individual for years without any ascertainable reason.[160]

This is the same type of "gap" that the *Rasul* Court alluded to when discussing the circuit court's decision in *Eisentrager*.[161] The court in *Eisentrager* was forced to analyze a situation where individuals within the country could not challenge their detention because of a jurisdictional hole created by the courts.[162] The lower court filled the gap in that case by going to the "fundamentals," meaning the Constitution.[163] The Supreme Court will likely be forced to do the same here by reaching the constitutional right to Habeas Corpus. The Court's only other recourse would be to find that the DTA is a temporary suspension of Habeas, rather than a blanket revocation.

1. Is the DTA an Invocation of the Suspension Clause?

Members of the Supreme Court may wish to defer to Congress by attempting to find an invocation of the Suspension Clause authority; but in the case of the DTA, that tactic will not succeed without a serious departure from prior decisions. In order to decide whether or not the statute is a legitimate, constitutional suspension of Habeas, the Court must first look to the plain language of both the clause and the statute in question. Second, it must analyze the historical reasons the Suspension Clause was included in the Constitution and the history of its use, as both are vital to understanding the scope of Congress' power to suspend. Third, the Court must apply its prior decisions concerning statutory interpretation to the instant case in order to maintain a coherent framework for future cases.

"The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the Writ of Habeas Corpus meant at the time the Constitution was drafted."[164] This sentiment, first articulated by Chief Justice Burger of the Supreme Court, has been largely echoed by

160. *See, e.g.*, Qassim v. Bush, 407 F. Supp. 2d 198 (D.D.C. 2005).

161. Rasul v. Bush, 542 U.S. 466, 478 (2004) ("Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*'s resort to 'fundamentals,' persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal Habeas review.").

162. *Id.*

163. *Id.*

164. Swain v. Pressley, 430 U.S. 372, 384 (1977) (Burger, C.J., concurring).

the courts throughout the years. The Court has also recognized "a long standing rule requiring a clear statement of congressional intent to repeal Habeas jurisdiction."[165] Justice Scalia stated that the 1679 Habeas Corpus Act "makes clear that indefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the Writ."[166] Taken together, these opinions form a mosaic that stands for the basic, inviolate, proposition that when Congress wishes to suspend Habeas Corpus it must do so expressly and for a limited period, even in wartime, in order to meet constitutional requirements.

The plain language of the Suspension Clause states that Habeas may only be revoked in times of invasion or rebellion.[167] The DTA revokes the Writ without requiring a finding of either. Nowhere in the legislative history of the statute is there an allusion to a finding of invasion or rebellion. In this case, were the Court to call this a suspension, it would have to effectively supply the requirement itself. Some have argued that the Authorization of Use of Military Force (AUMF) provides all the requisite findings for any action along these lines, but the Court's decisions in *Hamdi* and *Rasul* foreclose that conclusion.[168]

While there is certainly a colorable argument that the nation is at war, a finding of invasion or rebellion is not necessarily a corollary of that fact, as evidenced by the numerous wars the country has fought without invoking the Suspension Clause. Furthermore, it is quite apparent from the law itself that Congress enacted the DTA's jurisdiction-stripping provisions based on its power to confer jurisdiction on federal courts. The act makes no mention of the Suspension Clause, instead referring to 28 U.S.C. § 2241, the jurisdictional statute conferring power on the lower courts to hear Habeas petitions.[169] Rather than "suspending" the right, the statute removes it completely. It seems that if Congress were attempting to invoke the clause it would have couched the DTA in terms that invoke at least the indicia of the constitutional provision by making a determination that an invasion or rebellion existed.

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165. I.N.S. v. St. Cyr, 533 U.S. 289, 298 (2001).
166. Hamdi v. Rumsfeld, 542 U.S. 507, 564 (Scalia, J., dissenting).
167. U.S. CONST. art. I, § 9, cl. 2.
168. *Hamdi*, 542 U.S. at 507 (2004) (discussing the limitations of the AUMF).
169. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742-44.

The current set of facts bears very little resemblance to historical invocations of the Suspension Clause.[170] As discussed above, the Framers of the Constitution firmly believed the right to Habeas was virtually inviolate.[171] In fact, it was a difficult sell to convince many of the member-states at the Convention to include any authority to suspend the Writ, even under the most exigent circumstances.[172] Given this strong historical presumption against suspension, Congress has only suspended Habeas in very rare circumstances, and then only with the clearest statements of purpose.[173]

Over the last 218 years, Habeas has been suspended by Congress four times.[174] Each time, Congress clearly stated why the Writ was being suspended, distinctly found that there was a danger to the public necessitating the suspension, and stated that the Writ would be restored when the danger had passed.[175] Three of the four instances came in the midst of a declared war.[176] The fourth was enacted during an armed rebellion in a United States territory.[177]

The DTA does not state a purpose for removing the Writ, does not have any specific findings regarding an invasion or rebellion, does not state when the suspension will end, and most importantly, does not even mention the Suspension Clause. Perhaps all the trappings of legitimacy that accompanied prior invocations of the clause are not necessary; however, there certainly must be some evidence that Congress was acting under the Suspension Clause before the Supreme Court can determine that the action was constitutionally authorized.

From a jurisprudential perspective, the question becomes whether a complete removal of jurisdiction over a singular group (aliens), in a singular geographical location (Cuba), for an inde-

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170. *See supra* notes 70-86 and accompanying text.

171. *See supra* note 90 and accompanying text.

172. *See supra* notes 87-98 and accompanying text.

173. *See* Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755; Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14-15; Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 692; Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 153 (1900).

174. *See* Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755; Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14-15; Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 692; Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 153.

175. *See* Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755; Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14-15; Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 692; Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 153.

176. *See* Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755; Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14-15; Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 692.

177. Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 153.

terminate amount of time, constitutes, in essence, an invocation of the Suspension Clause. Justice Scalia, in his dissent in *Hamdi*, specifically stated that a legislative removal of Habeas Corpus through enacting requirements "other than the common-law requirement" of executive detention would effectively eviscerate the Suspension Clause.[178] By Justice Scalia's logic, Habeas Corpus was made a binary device by the Suspension Clause. It either works in its totality or it is suspended. It is important to note, however, that Scalia's dissent was based largely on Hamdi's U.S. citizenship.[179] In *Rasul,* Scalia dissented again, arguing that the same right that applied to Hamdi should not apply to Rasul because Rasul was not a citizen.[180]

2. *The* Ahrens *Gap*

Analyzing the Suspension Clause from a historical perspective inevitably leads to one conclusion — that the DTA is not a suspension. The necessary next step after such a determination is an analysis of the statute in order to determine if it creates an impermissible statutory gap, requiring the Court to reach the constitutional underpinnings of Habeas Corpus. Canons of constitutional avoidance will strongly encourage the Court to find a way to sidestep the issue by finding an avenue for detainees to exercise their right to Habeas.

In *St. Cyr*, the Court engaged in just such an artful construction to avoid deciding the issue of constitutionally-mandated Habeas.[181] However, due to the straightforward language of the DTA, the Court will likely be forced to reach, and decide, this constitutional issue.

In this instance, the canons of statutory construction outlined in *St. Cyr* will certainly come into play. In that case, the Court stated that: (1) when one interpretation will "invoke the outer lim-

178. Hamdi v. Rumsfeld, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting) ("The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the Writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements other than the common-law requirement of committal for criminal prosecution that render the Writ, though available, unavailing. If the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the Writ exist and the grave action of suspending the Writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.")

179. *Hamdi*, 542 U.S. at 575 (Scalia, J., dissenting).

180. Rasul v. Bush, 542 U.S. 466, 489 (2004).

181. I.N.S. v. St. Cyr, 533 U.S. 289, 299-300 (2001).

its of Congress' power" the Court requires a clear indication that that was the intended result, and (2) when one construction "would raise serious Constitutional problems," the Court will look for other interpretations.[182]

The two inquiries are connected in this case. Removing Habeas is certainly at the outer limits of Congress' power. It is a drastic step, only to be taken under specific conditions. The constitutional problem stems from the Court's desire to avoid articulating a right based in the Constitution for the first time — the right to Habeas in the absence of a jurisdictional statute. The Court clearly stated in *St. Cyr* that "[t]he fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the Constitutional questions that would be raised by concluding that the review was barred entirely."[183] Given this strong preference, the Court will likely attempt the same sort of statutory gymnastics that it successfully performed in *St. Cyr*. In this case, however, it is unlikely that the Court will be as successful.

One of the statutes in question in *St. Cyr* was entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS".[184] The Court held that the title alone was not enough to show congressional intent.[185] Because the statute's body merely outlined changes to the Immigration Act, it did not meet the intent standard.[186] Another statute proffered by the Executive in the case stated that "no court shall have jurisdiction to review any final order of removal against an alien."[187] The Court distinguished "judicial review" from "Habeas Corpus," stating that a withdrawal of one was not necessarily the withdrawal of the other.[188] The Court acknowledged that in several places in the statutory scheme, Habeas and judicial review language is used together, but claimed that this only further muddied the waters rather than showing any specific intent.[189] Lastly, the Court distinguished the so-called "zipper clause," which required all appeals of I.N.S. decisions to be brought in a specific appellate

182. *St. Cyr*, 533 U.S. at 299-300.
183. *Id.* at 301 n.13.
184. *Id.* at 309 n.31 (capitalization in original).
185. *Id.* at 309.
186. *Id.* at 311.
187. *St. Cyr*, 533 U.S. at 311.
188. *Id.* at 312.
189. *Id.* at 313 n.35.

court.[190] The Court held that because the provision only applied "with respect to review of an order of removal under subsection [1252](a)(1),"[191] it did not apply to the Court's ability to adjudicate Habeas Corpus petitions not governed by the statute.[192]

The current framework provides:

> Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—
>
> (1) an application for a Writ of Habeas Corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
>
> (2) any other action against the U.S. or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—
>
> (A) is currently in military custody; or
>
> (B) has been determined by the U.S. Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.[193]

The statute in *St. Cyr* and the DTA are functionally similar in that they attempt to remove the federal courts' ability to review detention by the Executive. While the language, if not the title, of the DTA is certainly more explicit than that of the *St. Cyr* statute, there is no bright line rule to decide what is "explicit enough."

A cynical view of the Court's actions may lead one to believe that, regardless of the language, the Court's desire to avoid the hard constitutional question will lead a majority of justices to find that Congress has not sufficiently expressed an intention to abrogate the right outlined in *Rasul*. If "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS" was insufficient in *St. Cyr*, it is plausible that the statute language "no court, justice,

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190. *Id.* at 313.
191. *St. Cyr*, 533 U.S. at 313.
192. *Id.*
193. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742-44.

or judge shall have jurisdiction to hear or consider . . . an application for a Writ of Habeas Corpus" may not be adequate either.[194]

Another possible interpretation is that the statute is legal to the extent that the current process designed by the military supplants Habeas Corpus. However, to the extent that the remedy is "inadequate or ineffective," Habeas Corpus remains.[195] The Court has already used this logic in *United States v. Hayman*,[196] when it held that the substitution of another remedy does not suspend Habeas Corpus.[197] This logic would allow the Court to keep the current system in place for detainees who are determined to be combatants, but would allow for Habeas Corpus for those found to be non-combatants. The problem with this interpretation is that the remedy that does exist is an extremely limited one, and in reality does not protect any rights. The only time the remedy is adequate is when someone is determined to be a combatant in a legitimate proceeding, at which point the Court is willing to cede almost complete power to the Executive.

The most likely determination by the Court in the instant case is that DTA is a complete bar to Habeas. While this contravenes the strong desire to avoid the constitutional question, no other interpretation makes as much sense. The statute specifically removes all avenues to Habeas from all courts.[198] The *St. Cyr* statute attempted the same course of action, but its text was not as explicit. By foreclosing not only the standard right to Habeas, but also all other claims against the Executive stemming from detention, Congress was very clear that it intended the DTA to be a complete jurisdictional bar. Because it is a complete bar in its current form, the Court will be forced to address the gap in the same way as the appeals court in *Eisentrager* — by addressing the underlying constitutional principles.

194. *Id.*

195. Swain v. Pressley, 430 U.S. 372, 381 (1977).

196. 342 U.S. 205 (1952).

197. *Swain*, 430 U.S. at 381 ("The Court implicitly held in *Hayman*, as we hold in this case, that the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the Writ of Habeas Corpus.")

198. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742-44.

B. A Constitutional Right to Habeas Under the Suspension Clause

The prisoners in *Rasul* and *Hamdi* did not argue for a constitutional right to Habeas Corpus, and the Court took great pains to not decide the issue.[199] In *Hamdan*, the appellant did argue that the Suspension Clause applied, but the Court avoided the argument based on the fact that Hamdan's case had already been filed when the DTA was enacted. The next case that reaches the Court from Guantanamo Bay by a detainee who filed after the DTA went into effect will essentially force the Court to address the issue of whether the Suspension Clause creates a constitutional right to Habeas Corpus in the absence of a jurisdictional statute.

If the Court determines the DTA is unconstitutional in its present form, but still believes a right should exist, they will have to address the *Eisentrager* circuit court's constitutional analysis. A historical analysis of the right coupled with an examination of prior cases before the Court will likely lead to the conclusion that the right does exist independent of any action by Congress. Following the constitutionality determination, the Court will have to examine the Executive's current activities and decide if they are reviewable through Habeas Corpus. Further, there will have to be a finding that the right applies to non-citizens if it is to be effective in the case. Lastly, if the Court does determine that the right attaches, it will still have to determine by what means a detainee can assert the right.

Any analysis of a constitutional issue must necessarily begin with an examination of the Framers' intent when they included the provision. In this instance, it is clear that the Framers believed that the right existed independent of any jurisdictional grant by Congress.[200] Preventing unchecked power was perhaps the most fundamental goal of the new Constitution, and by protecting the right to Habeas Corpus, along with articulating specific enumerated powers, the Framers performed the all-important task of restricting the powers of the Executive and Legislative Branches. Some members of the Constitutional Convention wanted the right to be absolute; others argued for a limited right

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199. Rasul v. Bush, 542 U.S. 466, 489 n.1 (2004) (Scalia, J., dissenting) (*see* Tr. of Oral Arg. 5 ("Question: And you don't raise the issue of any potential jurisdiction on the basis of the Constitution alone. We are here debating the jurisdiction under the Habeas Statute, is that right? [Answer]: That's correct . . . .").

200. *See supra* notes 78-98 and accompanying text.

to suspend Habeas in extreme circumstances.[201] Every state at the Convention supported a fundamental right to Habeas, and three voted against the existing provision because it gave Congress the power to suspend.[202] History unequivocally shows that, as Englishmen, the Framers considered Habeas their birthright, and as Americans, they considered it indispensable to the prevention of tyranny.[203] The right was to exist untouched unless a national emergency dictated otherwise, and then only for a short time.[204]

A textual and structural analysis of the Suspension Clause further supports the existence of the right absent a statute. The right is included in the Constitution alongside other clauses meant to limit the powers of government. The inclusion of the right in the Constitution is a means of ensuring its existence regardless of the activities of the various branches, short of a constitutional amendment.

When considered together with the specific limitations placed on the suspension of the Writ, one can easily see a workable system of checks and balances that depends on the right. The right must exist to prevent the Executive from unlawfully imprisoning individuals, and Congress may not cede power to the Executive to determine when the right can be suspended. Congress alone has authority to suspend the right, and it may only do so in cases of rebellion or invasion. The Framers implicitly stated that the right is a fundamental check on the powers of government by placing it alongside the "ex post facto" and "Title of Nobility" clauses.[205] They explicitly stated when it could be suspended. In all other instances, regardless of the actions of either the Executive or the Legislature, the right can be exercised.

Another view of the Suspension Clause postulated by the Court is that it places an affirmative duty upon Congress to establish access to Habeas Corpus. When this concept is coupled with Justice Scalia's analysis of Congress' power under the Suspension Clause, an interesting mosaic emerges. Congress must provide the Writ unless it expressly chooses to suspend it, but it cannot mitigate the Writ through limitation to the point of uselessness.

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201. *See supra* notes 90-91 and accompanying text.
202. FARRAND, *supra* note 89, at 438.
203. *See supra* notes 78-98 and accompanying text; *see also* FARRAND, *supra* note 89, at 341.
204. FARRAND, *supra* note 89, at 438.
205. U.S. CONST. art. I, § 9, cl. 2, 3, 8.

Other cases have determined that Congress is subject to a "constitutional command" to create an avenue for availing oneself of the Writ.[206] If there is such a "command" based on the Constitution, short of determining that the DTA is an explicit suspension of the Writ, the statute would have to be found unconstitutional by the Court.

The Court has on several occasions alluded to a constitutional right to Habeas without ever formally adopting a position that the right does exist absent the enabling statute.[207] The reason for the allusions to the right, rather than an explicit holding, is *Ex Parte Bollman*.[208] In that case Justice Marshall seemed to state in dicta that the right required a statute.[209] This decision has been roundly denounced by scholars for its political undertones.[210] Largely ignored by the Court, *Bollman*'s existence is the last barrier the Court will have to overcome in order to explicitly hold that Habeas Corpus exists without congressional action.

On its face, *Ex Parte McCardle*[211] supports those in favor of jurisdiction stripping, but in reality, it is not helpful. The case involved a Confederate private citizen who filed a Writ of Habeas Corpus after being jailed in the federal brig.[212] Congress stripped the Supreme Court's appellate jurisdiction over Habeas based on a jurisdictional statute.[213] Whenever a statute is passed, even a jurisdictional statute, the Court may still decide whether or not the statute is constitutional.[214] In that case, the Court held Congress had the power to strip the appellate jurisdiction of the courts.[215]

While *Ex Parte McCardle* accepted congressional jurisdiction stripping, at the time of the decision, the Judiciary Act of 1789 gave the Court the ability to grant an original Writ, effectively giving McCardle another way to reach the Court with his Habeas

206. Jones v. Cunningham, 371 U.S. 236, 238 (1973).

207. *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 477 (2004) (acknowledging a separate constitutional right to Habeas); I.N.S. v. St. Cyr, 533 U.S. 305 (2001) (rejecting statutory constructions that might conflict with the right to Habeas); McNally v. Hill, 239 U.S. 131, 135 (1934) (accepting that the Constitution implicitly recognizes a right to Habeas); *Ex Parte* Milligan, 71 U.S. 2, 130-31 (1866) (discussing the difference between suspending the writ and suspending the privilege).

208. *Ex Parte* Bollman, 8 U.S. 75 (1807).

209. *Bollman*, 8 U.S. 75.

210. Duker, *supra* note 46, at 135; *see generally* Freedman, *supra* note 88.

211. *Ex Parte* McCardle, 74 U.S. 506 (1868).

212. *McCardle*, 74 U.S. 506 (1868).

213. *Id.* at 513.

214. *Id.*

215. *Id.*

petition.[216] If McCardle had filed under section fourteen of the 1789 Judiciary Act, he would have been able to maintain his case.[217] The Court was not faced with the decision of allowing Congress to completely cut off a prisoner's right to Habeas. Therefore, *McCardle* is not dispositive, as some who favor Congress' action would like to believe. In *Ex Parte Yerger*, the Court held that section fourteen of the Judiciary Act still gave the Court jurisdiction over Habeas under facts very similar to those in *McCardle*, showing that the Court believed that its decision in *McCardle* did not truly remove its power to review Habeas cases.[218]

Rasul and *St. Cyr* are the most vital cases to the current analysis. Both cases consistently suggest that the right exists apart from a congressional grant due to its historical common law tradition. In *Rasul*, the Court pointed out that the Writ exists "antecedent to statute" and should be enforced for prisoners in Guantanamo.[219] In *St. Cyr*, the Court stated that, at a minimum, the right to Habeas exists as it did when the Constitution was written.[220] When the Constitution was written, the right to Habeas did not depend on any one statute, rather it was embedded in the common law.[221] To argue otherwise would be to say that on the day the Constitution was ratified the right did not exist. This proposition is untenable, given that in 1789 any judge sitting in equity could receive a Habeas petition.[222]

The *St. Cyr* Court held that an interpretation of Habeas Corpus based on a 1789 understanding of the law would support reviewing any executive detention, because "it is in that context that its protections have been strongest."[223] While the Court has done its best to not decide this issue in an attempt to avoid explicitly denouncing *Bollman*'s dicta, this situation presents no other option. The Court will likely have to acknowledge that the right to Habeas Corpus, as included in the Constitution, exists without any explicit congressional action.

The current situation, unreviewable detention by the Executive, is almost certainly what the constitutional right to Habeas was meant to protect against. If one examines the history of Habeas

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216. *Id.*
217. *McCardle*, 74 U.S. at 513 (1868).
218. *Ex Parte* Yerger, 75 U.S. 85 (1869).
219. Rasul v. Bush, 542 U.S. 466, 473 (2004).
220. I.N.S. v. St. Cyr, 533 U.S. 289, 301 (2001).
221. *See supra* notes 78-98 and accompanying text.
222. *Id.*
223. *St. Cyr*, 533 U.S. at 301.

back to its inception in England, this is perhaps the most important reason for its existence. When the English nobility forced King John to sign the Magna Carta, they were not concerned with ensuring review of their rights at trial, they were ensuring their right to not be held indefinitely without good reason.[224] Because the Executive's activities, which Congress is attempting to protect through the DTA, are clearly implicated in the history of Habeas Corpus, the Court will have to find the statute unconstitutional per the Suspension Clause.

C. Exercising the Constitutional Right

Upon determining that the right to Habeas exists without a statute, the Court will have to address how exactly a prisoner can exercise the right. The DTA purports to remove from any "court, justice, or judge" the ability to consider a Writ.[225] This language was undoubtedly drafted to remove the possibility of an original Writ not only being issued by a sitting court, but also to prevent an individual justice of the Court from issuing a Writ. Justices have had the power to issue Writs personally since the inception of Habeas Corpus jurisdictional statutes.[226]

As pointed out by Professor Hartnett, without this power to issue Writs in the first instance, an untenable constitutional conundrum exists.[227] If the Supreme Court cannot hear original Writs without a jurisdiction grant, if the state courts cannot review federal detention, if Congress is not required to make inferior federal courts, and if the Suspension Clause by implication imbues the right to the Writ to all, we are left with a contradictory system.[228] If Congress chose not to create lower courts, no entity would be able to hear a Habeas petition in the first instance, so no one would be able to exercise his constitutional right to Habeas. Habeas Corpus would effectively be permanently suspended if Congress did not create lower courts and no inherent original jurisdiction existed in the Court.

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224. 5 THE CAMBRIDGE HISTORY OF THE BRITISH EMPIRE 487, 503 (P.J. Marshall ed., 1988).

225. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742-44.

226. *See* Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 271 (2005).

227. *Id.*

228. *Id.* at 255-56.

Professor Hartnett's analysis is premised on the underlying statutory grant to the individual justices, but his conclusion does account for a complete removal of the grant.[229] He postulates that under a scheme that removes the power of any court to hear a Writ and removes the power of individual justices to do so, the Court would be forced to find a violation of the Suspension Clause.[230]

One possible solution to this problem is to say that, while a jurisdictional statute is necessary for any case not covered by the Court's Article III jurisdiction generally, Habeas Corpus is an exception. Given the Framers' placement of the right in the Constitution specifically, one could make the argument that it should be lumped in with the cases and controversies outlined in Article III.

The Framers likely viewed the right to issue Writs as inherent in the courts. They likely saw no need, past authorizing the existence of the Court, to further outline the Court's right to hear the petitions because Habeas petitions had been heard throughout the colonies with or without an enabling statute for decades.[231] In fact, the Suspension Clause might lead one to the exact opposite conclusion — that an affirmative act of Congress in times of insurrection or rebellion would be the only possible way the Writ could be removed from the Court, and a jurisdictional statute was never necessary for the court to hear extraordinary Writs in the first place.

Another possible solution involves the Court's analysis of where a detainee can sue. The Court in *Rasul* affirmed the position that the location of the detainee does not matter if the jailer is readily available when it stated "the Writ of Habeas Corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody."[232] The Court went even further and reaffirmed its position in *Ahrens* stating, a "petitioner's absence from the district does not present a jurisdictional obstacle to the consideration of the claim."[233]

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229. *Id.* at 290.

230. *Id.*

231. *See supra* notes 78-86 and accompanying text.

232. Rasul v. Bush, 542 U.S. 466, 478 (2004) (citing Braden v. 30th Judicial Cir. Ct. of Ky., 410 U.S. 484, 494-95 (1973)).

233. *Rasul*, 542 U.S. at 536 (citing *Braden*, 410 U.S. at 498 (citing Burns v. Wilson, 346 U.S. 137 (1953), *rehearing denied*, 346 U.S. 844, 851-852 (opinion of Frankfurter, J.); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); Hirota v. MacArthur, 338 U.S. 197, 199 (1948) (Douglas, J., concurring)).

The question must then be asked — does the jurisdictional clause in the DTA change the analysis? The DTA purports to modify the jurisdictional grant, removing the right from non-citizens in Guantanamo Bay. However, given the Court's holdings, this may not matter. If the Court chooses to look at the statute granting jurisdiction solely from the point of view of the jailer and not the jailed, the fact that the detainees are in Guantanamo Bay does not matter at all. As long as the statute can still reach those in charge of their detention — the President and the Secretaries of Navy and Defense — the Court may be able to find that the detainees can file Habeas Corpus petitions.

Once an avenue for exercising the right is found, the Court must still determine whether a right based in the Constitution extends to non-citizen detainees. Given their prior jurisprudence and the history of the Writ, it seems that the Court will likely find in favor of the alien detainees on this point. In *Eisentrager*, the Court specifically addressed the constitutional right to Habeas by articulating several factors that would form the framework for deciding if someone had a right to file a petition.[234] The Court in *Rasul* applied those factors and concluded that Guantanamo detainees met them.[235] The *Rasul* decision expressly stated that "[a]liens held at the [Guantanamo] base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241."[236] The Court was willing to allow detainees jurisdiction under the Habeas jurisdictional statute. If the Court was willing to recognize a constitutional right, there is very little evidence that that right would not apply to non-citizens and citizens alike.

D. Can Congress and the Executive Create an Unreviewable Jurisdictional "Black Hole" in Cuba?

The majority opinion in *Rasul* unequivocally held that U.S. law applies in Guantanamo Bay, Cuba.[237] That territory is considered part of the United States for the purposes of any legal analysis. The Executive acknowledges that citizen-detainees in Guantanamo Bay would normally have the right to Habeas Corpus and all other legal rights.[238] Effectively, the DTA could just as easily have taken jurisdiction over Habeas Corpus away from naval brigs

234. Johnson v. Eisentrager, 339 U.S. 763, 777 (1950).
235. *Rasul*, 542 U.S. at 475-76.
236. *Id.* at 481.
237. *Id.*
238. *Id.* at 481.

in Norfolk, Virginia, or Key West, Florida. Given the lack of any special treatment of the Naval Base at Guantanamo Bay, is there a coherent argument for removing jurisdiction over this one class of persons?

Ostensibly, the Executive would argue that it does make sense, given the necessities of the unconventional war being waged around the globe. It is doubtful that the Court would agree with this position, as it has held that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[239]

While the Court does give a significant amount of deference to the scope of Executive power in wartime, it is not absolute.[240] In this instance, like in Justice Kennedy's concurrence in *Rasul*, the factors outlined in *Eisentrager* will likely guide the Court's analysis of Executive action.[241] It seems to be an especially apt test because, in the words of Justice Kennedy, "*Eisentrager* considered the scope of the right to petition for a Writ of Habeas Corpus against the backdrop of the Constitutional command of the separation of powers."[242]

The *Eisentrager* factors are: alienage, the place of detention, the combatant/non-combatant status of the detainee, and the extent to which affording the detainees Habeas Corpus would affect the war effort.[243] Just as in *Rasul*, all of these factors point towards allowing Habeas Corpus for the detainees.[244] While the Executive and Congress may argue that the current scheme allows for some re-

239. Hamdi v. Rusmfeld, 542 U.S. 507, 536 (2004) (citing Mistretta v. United States, 488 U.S. 361, 380 (1989) (stating that it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty")).

240. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 613 (1952); *Hamdi*, 542 U.S. at 536 ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly ensures a role for all three branches when individual liberties are at stake.") (citing *Mistretta*, 488 U.S. at 380).

241. *Rasul*, 542 U.S. at 485 (Kennedy, J., concurring) ("In my view, the correct course is to follow the framework of *Eisentrager*.").

242. *Id.* at 485-86.

243. *Id.* at 487-88.

244. *Id.* ("The facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions. First, Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities . . . . The second critical set of facts is that the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status.").

view, it does not allow for review of the substantive outcome of the military's hearings. Detainees can still be held indefinitely after they are determined to be non-combatants. "Indefinite detention without trial or other proceeding presents altogether different considerations. . . . It suggests a weaker case of military necessity and much greater alignment with the traditional function of Habeas Corpus."[245]

E. Are There Avenues Besides Habeas for the Detainees?

Other avenues exist for challenging one's detention by the Executive.[246] The Court has held that while an act may remove jurisdiction from the courts, the act in and of itself must still be constitutional and is reviewable for that purpose.[247] The detainees might bring Writs of Mandamus, Bivens actions, or file under the All Writs Act. The problem with bringing any of these actions is the second clause of the DTA. The language that will be the most damning to the constitutionality of the DTA states that a prisoner may not bring "any other action against the United States or its agents relating to any aspect of . . . [his] detention . . . ."[248] The question is then posed, to what extent will the Court allow an almost total removal of rights from a non-citizen detained in a place where the Court has already stated that U.S. law unequivocally applies?

Setting aside a challenge of the constitutionality of the underlying statute, given the blanketing nature of the DTA, can a detainee seek relief through any other action? A literal reading of the DTA makes that seem unlikely. However, a colorable argument can be made for allowing what are effectively federal common law claims to exist even after the DTA. A Bivens action is based solely on the Constitution, and does not require a statutory grant.[249] While Congress was undeniably attempting to remove Bivens actions as well, the issue of removing a common law cause of action through affirmative jurisdiction stripping has never been fully litigated, and the avenue may be open to the detainees.

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245. *Id.* at 488.

246. JENNIFER K. ELSEA & KENNETH THOMAS, CONGRESSIONAL RESEARCH SERVICE, GUANTANAMO DETAINEES: HABEAS CORPUS CHALLENGES IN FEDERAL COURT 17 (2006).

247. Williams v. Rhodes, 393 U.S. 23, 29 (1968).

248. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742-44.

249. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

Given the standard of review Congress has required, appellants may also be able to challenge the DTA as a facially unconstitutional assault on the separation of powers. The DTA requires the D.C. Circuit Court to review only whether or not the Defense Department has met its own standards for determining the status of a detainee.[250] Once the Court has determined this, ostensibly, the case is over, and the detainee goes back to Guantanamo Bay.

In a situation where the Court finds that the Defense Department has not met its own standards, it appears the next step would be a retrial before the CSRT, as the release of a detainee prior to combatant determination would raise obvious problems. During this entire process, the detainee would remain, of course, detained. Furthermore, even if the detainee was found to be a non-combatant after his retrial, his release would be by no means guaranteed.[251]

In *Hayburn's Case*, the Court held that a jurisdictional grant of power by Congress to the courts which allowed for further review by the Secretary of War was unconstitutional because "no decision of any court of the United States can, under any circumstances . . . be liable to a revision, or even suspension, by the [L]egislature itself, in whom no judicial power of any kind appears to be vested."[252] In that case, just as in the current situation, Congress gave the Executive Branch, and specifically the military, the power to suspend a decision of the courts.[253] In this case, Congress has removed the power of the Court to reach the merits of a case or to bring any measure of finality to the controversy; therefore, a colorable argument can be made that it, too, is unconstitutional.

F. The Indefinite Nature of Warfare in the Modern World

The idea that this "war" should be fought under a different rubric than any before was addressed tangentially by the majority opinion in *Rasul*.[254] In *Hamdi*, the same issue was a major point of the majority opinion.[255] In that case, the Court clearly stated

250. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742-44.

251. *See, e.g.*, Qassim v. Bush, 407 F. Supp. 2d 198 (D.D.C. 2005).

252. Hayburn's Case, 2 U.S. 408, 410 (1792).

253. *Hayburn*, 2 U.S. at 410.

254. Rasul v. Bush, 542 U.S. 466, 488 (2004).

255. Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004).

that detention, without a combatant determination, is not legal.[256] However, the pure mechanics of the current statute would make it allowable. The Court in *Hamdi* acknowledged that the indefinite nature of the current conflict made long-term detention a real possibility.[257] The Court was unwilling to give the Executive carte blanche to continue a practice of holding individuals indefinitely.[258] In fact, the Court specifically stated that the Authorization of Use of Military Force (AUMF) did not grant the Executive the power to hold individuals indefinitely for the purpose of interrogation.[259]

In instances where the Executive has determined that an individual is not a combatant, the grant of power to the Executive to hold individuals in times of war dissipates, and another logical conclusion for the detention must be drawn.[260] In the absence of an exceptional justification articulated by the Executive, the only reasonable conclusion is that the individual, regardless of his combatant status, has some intrinsic value to the Executive, either as an intelligence asset or as a bargaining chip.

The *Hamdi* Court specifically stated that individuals determined to be combatants could be held for the "duration of these hostilities."[261] In an effort to show that hostilities were ongoing at the time of the decision, the Court pointed to news reports of fighting in Afghanistan.[262] This logic presents severe problems given the paradigm shift in warfare.

The Court is presented with what can only be described as the farcical task of comparing the War on Terror to the Battle at Runnymede. When battles between sovereigns are finished, combatants lay down their arms. The current battle, however, has no end, no beginning, and no opposing sovereign nation. To argue for any "duration of the hostilities standard" is to grasp at air. There will be no victory declared, no treaty signed, no armistice. There will only be a slow, deliberate wearing down of one side by the other.

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256. *Hamdi*, 542 U.S. at 520.
257. *Rasul*, 542 U.S. at 563.
258. *Id.* at 536 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).
259. *Hamdi*, 542 U.S. at 521.
260. *Id.* at 536.
261. *Id.*
262. *Id.* at 521 (citing Pamela Constable, *U.S. Launches New Operation in Afghanistan*, WASH. POST, Mar. 14, 2004, at A22).

Given the nebulous nature of the standards at play and the possibility of detention long after an appeal to the circuit court has been exhausted, it is quite possible that the Supreme Court, given its decisions in *Hamdi* and *Rasul*, will take issue with the statute as currently written, unless it can find a way to still provide detainees with a method by which they can avail themselves of the Great Writ.

IV. RECOMMENDATION

While there are multiple ways for the Court to approach the constitutional problems stemming from the DTA, the only approach that brings clarity and finality to the situation in Guantanamo Bay is to find the statute is an unconstitutional violation of the Suspension Clause. If the Court instead engages in *St. Cyr*-like semantics and jurisdictional gymnastics in order to avoid the constitutional issue, Congress will no doubt remove the alternative path to Habeas Corpus articulated by the Court.

By articulating the right as inherent in the Constitution and independent of any jurisdictional statute, the Court would effectuate the intent of the Framers. A clear constitutional decision would also allow Congress and the Executive to modify their behavior in order to effectively fight the war on terror without the constant nuisance of court battles. Specific changes to the statutory scheme can be made that protect the right as articulated by the Court, while still allowing for detention sans Habeas when a detainee is determined to be a combatant.

The Supreme Court should embrace the appellate court's logic from *Eisentrager* that the right to file a Writ exists in the absence of a jurisdictional statute. The *Eisentrager* Court based its decision on three premises, which are completely supported by a historical analysis of the right. First, Habeas is an inherent common law right. Second, the Constitution limits the suspension of Habeas to very specific circumstances to the exclusion of all other reasons for suspension. Third, Congress cannot succeed in limiting Habeas by electing to not enact a jurisdictional statute if it is constitutionally restricted from limiting it through affirmative action.

While Congress indisputably has the power to remove and/or change the jurisdiction of the courts, it does not have the power to remove the opportunity to avail oneself of constitutional rights. Because a specific mechanism exists in the Constitution to remove the right to Habeas Corpus, an end-run to remove jurisdiction

cannot be considered a legitimate use of Congress' constitutionally granted power over the courts. Furthermore, while the Court will likely accept historically supported arguments that the Executive can determine who is a combatant, and a combatant does not have to be afforded the right to Habeas Corpus, it cannot accept indefinite detention, especially in cases where the detainee has been determined to be a non-combatant through the Executive's own procedures.

In order to remove the DTA from any constitutional conundrum, Congress need only change a few words, making it possible for a detainee who has been adjudged a non-combatant to avail himself of the courts. This is, of course, easier said than done. Such a change would achieve the Executive's purported goals of preventing a flood of petitions from detainees, while giving due deference to the Courts and to the notions of due process, a restrained Executive, and individual rights upon which the common law and the United States are built.

If the language of the DTA were modified to remove the right from detainees who have either been determined to be a combatant, or who have not yet been determined a combatant and are awaiting a CSRT, the Court would almost certainly uphold the statute. By limiting the statute to only those individuals still considered to be involved in the war in some way, Congress would appeal to the Court's desire to steer clear of the Executive's wartime powers. At the same time, it would allow the Court to become involved when an individual has been removed from the war zone. The power to make this determination would still lie with the Executive, allowing enough flexibility for continued operations.

The only additional change required to escape constitutional invalidation would be a specific time requirement for the CSRT. This limit would prevent the Executive from holding a detainee in "pre-CSRT limbo" for an indeterminate amount of time. Without this limitation, Justice Kennedy's concerns in *Rasul*, as outlined by the *Eisentrager* standards, remain. By adding this requirement, the system would take on a more definite tenor and become more palatable to the Court.

V. CONCLUSION

The underlying purpose of Habeas Corpus and the Suspension Clause is to prevent unlawful Executive detention of non-combatants. Under the current system, certain aspects of such

detention cannot be challenged. While Congress does have the power to regulate the federal courts' jurisdiction, it does not have the power to remove the right to hear Habeas petitions. Because this is what the DTA purports to accomplish, the Court will most likely overturn the statute based on the constitutional right to Habeas Corpus. If Congress wishes to maintain the current system, it will have to change the statute to restore Habeas Corpus and other federal causes of action to those individuals who have been determined to be non-combatants.